

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:CTR:HAR:TL-N-421-99

EFAlair

date: February 11, 1999

to: Chief, Examination Division, Connecticut-Rhode Island District
Attn: Chuck Stuart, Case Manager
Leonardo Valentino, Team Coordinator
Group 1107, Hartford, CT

from: District Counsel, Connecticut-Rhode Island

subject: [REDACTED]

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This responds to your request for advice concerning whether the statute of limitations expired prohibiting assessment of deficiencies for [REDACTED] in the amounts of \$ [REDACTED] and \$ [REDACTED] for the fiscal years ending January 2, [REDACTED] and December 31, [REDACTED], respectively. Based on the facts set forth herein, we conclude that the statute of limitations for the purpose of assessing additional deficiencies for both years expired on [REDACTED]. UIL No.: 6503.00-00.

FACTS:

[REDACTED] requested Competent Authority assistance seeking relief from double taxation for an I.R.C. § 482 issue regarding its fiscal years ending January 2, [REDACTED] and December 31, [REDACTED], while the case was pending in the Appeals Office (Appeals). For these fiscal years, Appeals obtained an extension

of the statute of limitations, which expired on [REDACTED].

On [REDACTED], before the expiration of the statute of limitations, [REDACTED] filed protective claims in amended corporate returns (Forms 1120X) for the fiscal years ending January 2, [REDACTED] and December 31, [REDACTED]. These amended returns specifically state that the claims are intended to cover all items of income, gain, loss, deductions and tax credits, which could result from the determination rendered by Competent Authority.

Appeals secured a Form 870-AD from [REDACTED]. The Form 870-AD permits the assessment of deficiencies in the amounts of \$[REDACTED], \$[REDACTED] and \$[REDACTED] for the fiscal years ending January 2, [REDACTED], December 31, [REDACTED] and December 30, [REDACTED], respectively. The Form 870-AD also reserved [REDACTED] right to file claims for refund of income tax and/or adjust the amounts of income, gain, loss, deductions or credits arising from matters pending before the United States Competent Authority. The Form 870-AD, however, did not reserve the Service's right to assert additional deficiencies. The Service also did not extend the statute of limitations beyond [REDACTED], since Competent Authority was not expected to determine that additional deficiencies were due from [REDACTED], and, in fact, Competent Authority only determined that minimal deficiencies are due. After execution of the Form 870-AD, Appeals closed its case in [REDACTED].

In [REDACTED], Competent Authority settled the section 482 issue. Based on the settlement, the International Examiner computed the adjustments, which resulted in deficiencies due from [REDACTED] in the amounts of \$[REDACTED] and \$[REDACTED] for the fiscal years ending January 2, [REDACTED] and December 31, [REDACTED], respectively.

LAW AND ARGUMENT:

In accordance with I.R.C. § 6501(c)(4), the statute of limitations for asserting deficiencies against [REDACTED] for the fiscal years ending January 2, [REDACTED] and December 31, [REDACTED] expired on December 31, [REDACTED], when the final extension agreement expired.

The Form 870-AD cannot extend the statute of limitations, since it is not an extension agreement. Instead, the Form 870-AD only acts as an 'informal' agreement, not necessarily binding on the parties. See Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929); Lignos v. United States, 439 F.2d 1365, 1367 (2d Cir. 1971). Generally, issues regarding Forms 870-AD arise when

a party attempts to act inconsistently with its terms. In that situation, the doctrine of equitable estoppel may prevent a party's inconsistent actions when the party made a misrepresentation of fact in the document having reason to believe the other party would rely upon it, and, in fact, the other party relies on the misrepresentation to its detriment. See Heckler v. Community Health Services, 467 U.S. 51, 59 (1984). Since [REDACTED] is not attempting to act inconsistently with the terms of the Form 870-AD, this doctrine is not implicated.

The statute of limitations for [REDACTED] claims did not expire, however, since prior to the expiration date of the last extension agreement, [REDACTED] filed protective claims¹ in amended returns for each fiscal year and further reserved its right to make such claims in the Form 870-AD. Since the Service, did not similarly reserve its right to assert additional deficiencies in the Form 870-AD and allowed the statute of limitations to expire, it is not protected. Therefore, the Service cannot assess the deficiencies of \$ [REDACTED] and \$ [REDACTED] for the fiscal years ending January 2, [REDACTED] and December 31, [REDACTED], respectively.

CONCLUSION:

The Service should not attempt to assess the deficiencies for the fiscal years ending January 2, [REDACTED] and December 31, [REDACTED], respectively. (b)(7)e

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Further, this opinion is based upon the facts set forth herein. Should you determine that they are different, you should not rely upon this opinion without conferring with this office, as our opinion might change. Further, this opinion is subject to ten day post-review procedure in our National Office. That review might result in modifications to the conclusions herein. Should our National Office suggest any material change in the advice, we will inform you as soon as we hear from that office.

^{1/} If [REDACTED] pursues claims, the Service is entitled to offset the barred deficiencies against any refund of taxes not previously assessed. See Lewis v. Reynolds, 284 U.S. 281, 283 (1932), modified on other grounds, 284 U.S. 599 (1932). The rationale of Lewis, is that a taxpayer is not entitled to a refund unless he overpaid his tax for the year at issue.

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If you have any questions, please contact Attorney Elise F.
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